IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

Regular Second Appeal No.275 of 1995.
Judgment Reserved on: 04.05.2007
Date of decision: 10.05.2007

K.S. Mehta and Another **….Appellants.**

Versus

State of H.P. and Others **….Respondents.**

Coram

The Hon'ble Mr.Justice Dev Darshan Sud,J.

Whether approved for reporting ?[1]

For the Appellants: **Mr.Bhupender Gupta, Senior Advocate with Mr.Neeraj Gupta, Advocate.**

For the Respondents: **Mr.Rajan Dewan, Additional Advocate General.**

Dev Darshan Sud,J.

This is plaintiff's second appeal against the judgment and decree of the learned District Judge, Solan, reversing the judgment and decree passed in favour of the plaintiff by the learned Senior Sub Judge.

The facts necessary for decision are that the plaintiff instituted a suit for mandatory injunction against the defendants-respondents praying for a decree with costs and a direction to the defendants to remove the debris which had been dumped on her land without permission and to restore the land to its original position. Notice under Section 80 of the Code of Civil

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgement*?**

Procedure had been issued to the defendants for non-compliance of the demand of the plaintiff. Hence, the suit was instituted. The plaintiff had pleaded that a Notice Board had been put up on her land by the Public Works Department stating that the place was to be used as a dumping ground for debris. The defendants, in written statement, denied the case of the plaintiff in its entirety stating that no Board had been put up by the Public Works Department and that the State was in no way responsible for dumping debris on the land. The learned trial Court framed four issues. Issue No.1 related to the ownership rights of the plaintiff which was decided in her favour, as such ownership was neither disputed nor any evidence led to the contrary by the defendants. Issue Nos.2 and 3 were decided together. These issues were to the effect as to whether a Board had been fixed on the plaintiff's land stating that the ground was reserved for dumping of debris and whether the plaintiff was entitled to the relief of mandatory injunction. Both these issues were decided in favour of the plaintiff and a decree for mandatory injunction was granted. The findings of the learned trial Court were based inter alia on photograph Ex.PW-5/B containing words *"Site for dumping debris"* and below that the words, *"By Order XEN, HPPWD".* The negative of the photograph was covered with dust and therefore, it was got re-printed through PW-5, who was having a photo studio in Chandigarh.

The learned trial Court also relied upon the oral testimonies of the witnesses of the plaintiff, namely; PW-1, Shri Kanti Swaroop Mehta, General Attorney of the plaintiff, who stated that he was well conversant with the facts of the case and in a position to depose about the factual aspects of the matter. PW-2, Vijay Kumar and PW-3, Charan Singh were also examined in support of the case of the plaintiff. Both these witnesses were residing in the vicinity of the land.

While deciding the case, evidence was considered in totality including the evidence of the defendants. DW-2, who stated that he was tractor driver and dumping the debris on the land of the plaintiff for which Rs.15/- per tractor was being charged. However, when cross-examined, he has admitted that the government used to dump the debris there. He also admitted that the Board as shown in Ex.PW-5/B has been fixed on the site. The relevant portion of his cross-examination reads:-

> *"Yeh theek hai ki pehle sarkar ke log apna malwa us jageh per fainkte the jahan Ex.PW-5/B mein Board laga tha"*

Similarly, DW-1 has admitted in his cross-examination that thousands of truck loads of debris were thrown on the suit land, but he denied that the government was dumping debris there. The undisputed evidence further shows that the land was situated near a college and is quite valuable. The learned trial Court

decreed the suit of the plaintiff directing the defendants to remove the debris from the suit land and to restore it to its original position.

An appeal having been preferred by the defendants, the learned District Judge set aside the judgment and decree of the learned trial Court. For reaching this conclusion the learned appellate Court considered the evidence of the witnesses holding that no reliance could be placed on the evidence of PW-1 since the information regarding dumping of debris was given by one Rup Singh to this witness who had not been produced. Similarly, no reliance can be placed on the testimony of PW-3, who according to the learned appellate Court was anxious to help the plaintiff and has actually not seen any of the government vehicle dumping debris on the site. Coming to the evidence of PW-5, the learned appellate Court, rejected his testimony on the ground that he was a photographer from Chandigarh and Ex.PW-5/B had been tampered with by him. This was based on the submission made by the counsel appearing for the State although there was no factual foundation either in the pleading or evidence and no material on record to support such finding. In conclusion it was held that the plaintiff, having not approached the Court earlier in point of time when knowledge was acquired, was not entitled to the discretionary relief of injunction.

I have heard learned counsel for the parties and have gone through the record.

The findings of the learned appellate Court are not based on the state of evidence as it exists. A new case has been made out for the defendants which was neither pleaded nor proved. The grounds for disbelieving PW-5 are not germane in law. His testimony is clear when he states that the photograph Ex.PW-5/B was printed after removing the dust from the negative and using a special photographic paper. The words, *"By Order of XEN HPPWD"* became visible only after the dust had been removed from the negative. There is nothing on the record to show or suggest that this photograph has been tampered with or fudged. How and under what circumstances this argument came to be made and accepted by the learned appellate Court is not clear. The fact that PW-5 was a photographer from Chandigarh, could not detract from the veracity of his testimony. Place of residence of a witness is not a ground for disbelieving him. The defendants have also not placed anything on the record to show that PW-5 was infact a person who was intimate with the plaintiff and specially produced in evidence in order to falsify the truth. On the other witnesses, the conclusion of the learned appellate Court that the evidence is hearsay is not borne out from the record. In-fact, the learned District Judge ignored the evidence of PW-1 and the other witnesses, namely; PW-2 and PW-3 who, had stated that they have seen the Board fixed on the site. Of-course, the exact date or time when the Board was fixed, was not within knowledge of

these witnesses, but that fact by itself would not falsify the case of the plaintiff. When read with the evidence of the defence witnesses, it is clear that the place was used as a dumping site. Now whether this site was authorised by the State or by the plaintiffs themselves was a crucial factor. For this, it is the testimony of PW-5 which would be relevant. As observed by me, the learned appellate Court has brushed aside this testimony on a conjectural basis on the possibility of the photograph having been fudged which was a suggestion in argument by the State counsel, although nothing was proved on the record. The reasons given by the learned appellate Court in disbelieving the evidence of PW-5 cannot be sustained in law. Cross-examination of the witness has not brought any substantive material to show that the photograph was tampered with. As observed by me, that the record itself shows that even, according to the evidence of the defendant (DW-2 Harish Kuamr), the land of the plaintiff has been used as a dumping place of on a positive act having been committed by the defendants marking and designating the place as a dumping ground.

The learned appellate Court is wrong in observing that since the plaintiff did not approach the Court within a particular period or immediately after the debris was being dumped on the ground, it is a fact which would be used against them. Having committed a tortuous act and continued to do so, unless acquiescence

on the part of the plaintiff can be inferred from the evidence on record, the finding of the learned appellate Court is not in accordance with law. A trespasser on another person's property cannot claim justification of the act by mere silence or inaction on the part of the owner of the land unless it can be shown that the only conclusion of such silence is grant of permission for the commission of the act. A suggestion has been made by the respondents that the plaintiff used to charge 15 rupees per truck load for allowing his land to be used as a dumping ground which fact has not been proved on record.

Learned counsel for the appellant-plaintiff has cited ***Mt.Bhagwanti vs. Mohan Singh and another, AIR 1934 Lahore 847*** has held as under:

> *"It is true that the grant of a mandatory injunction is an equitable relief which it is discretionary with the Court to grant or to refuse. Ordinarily a great deal of delay in the institution of the suit would disentitle the plaintiff to the grant of a mandatory injunction. However, the question as to whether there has been unreasonable delay in the institution of the suit depends on the circumstances of each particular case."*

I do not find anything on the record to suggest that the plaintiff has been negligent in delaying the institution of the suit. The evidence does

not suggest any such inaction on her part nor has the defendants brought on the evidence to show that there was deliberate omission on the part of the plaintiff to file the suit.

Learned counsel has also placed reliance to the judgment of the Kerala High Court in ***C.Kunhammad*** *vs.* ***C.H. Ahamad Haji, AIR 2001 Kerala 101,*** holding that when an injury is caused to a plaintiff which cannot be remedied by granting compensation, such plaintiff is entitled to a decree for mandatory injunction. This proposition of law is well settled. The defendants have not suggested that money would be adequate compensation to the plaintiff instead of a decree for mandatory injunction. In the circumstances, the plaintiff would be entitled to a decree for mandatory injunction.

At the time of admission, question No.3 which was framed, was to the effect as to whether the learned lower appellate Court was correct in denying the relief of mandatory injunction when it was established that the debris on the suit land was a direct consequence of the defendants' affixing a Notice Board on the land of the plaintiff without any justification. As I have held that the ownership of the plaintiff is not disputed and is proved. The evidence of PW-5 has been read out of context and disbelieved only on the ground that he is from Chandigarh which fact is not relevant to discard the credibility of a witness. Place of residence does not assume importance for believing or disbelieving the

testimony of a witness. It is the substantive narration of facts tested by cross examination which is relevant. The evidence of other witnesses, namely; PW-1, PW-2, PW-3 and PW-4, cannot be brushed aside only on the ground that it is hearsay evidence and cannot be read in a truncated manner. The evidence has to be considered as a whole and in conjunction with the evidence led by the defendants. When this is done, the conclusion arrived at by the learned appellate Court cannot be sustained by any means whatsoever even with re-appreciating the evidence. Appreciation of evidence would require reading it as a whole and not picking up one or two lines for arriving at a particular conclusion. The version put forth by the witnesses is natural and there is no ground to doubt their testimonies. In the circumstances of the case, this appeal is accepted. Question No.3 is answered in favour of the appellants. The judgment of the learned District Judge is set aside. The suit of the plaintiff is decreed for mandatory injunction. The decree of the learned Sub Judge is restored. There shall be no order as to costs.

May 10, 2007. **(Dev Darshan Sud)**
(aks) **Judge**